

Sweden and COVID 19: A Constitutional Perspective

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The Swedish government's ways of handling the Corona crisis have drawn a lot of international attention. Sweden has tried to limit the spread of the disease by means of recommendations, rather than quarantines and curfews. There is no provision in the Swedish constitution for the declaration of a state of emergency in peacetime, only in war or where there is an imminent danger of war ([*Regeringsformen*](#), RF Chapter 15). Instead, the Swedish approach is to have delegations to the government, and sub-delegations to administrative agencies in a variety of statutes (called *författningsberedskap* "anticipatory statutorification" (see generally J. Hirschfeldt, "Mänskliga rättigheter och andra konstitutionella kärnvärden när krisen slår till", in A S Lind, E Namli (eds) *Mänskliga rättigheter i det offentliga Sverige*, Studentlitteratur, 2017). Where these turn out to be inadequate, the solution is to rely upon the possibility for the parliament to pass laws quickly. The ordinary legislative procedure is flexible in a time of crisis which means that a law, subject to political agreement, can be passed quickly.

Constitutional Framework

Sweden does not have ministerial government, as is common in many states. Instead, the constitution stipulates that government decisions are collective cabinet decisions, even if they are prepared within specific ministries (RF 7:3). Individual ministers of government wield little formal public power. Central public administration is performed by semi-autonomous administrative agencies, which have a duty to obey government directives (RF 12:1). However, agencies have the constitutionally protected freedom to interpret and apply the law in individual cases (RF 12:2). Swedish administrative agencies are thus not exercising their powers per delegation from the minister of a particular ministerial department. Except in cases where administrative authorities are specifically given oversight or appeal functions, they are not in any hierarchical position vis-à-vis one another.

At the national level, the parliament and the government set out basic rules and binding standards in statutes, as well as goals to be achieved. The regions are responsible for hospital and primary health care. The municipalities are responsible for the care of the elderly, care for persons with physical and mental disabilities, support and service to persons who have been completed and discharged from hospital care and for school health care. Some public services, in education, primary health care and care of the elderly, are provided by private actors which have been procured by the local or regional authorities. Such procured services are governed by both the relevant legislation, and the terms of the contracts concluded.

In an emergency, such as a pandemic, the need for flexibility and speed often entails shifting legislative power from the parliament to the government. RF Chapter 8 contains a relatively detailed list of areas of law the regulation of which generally requires a statute. In principle, any public law norms entailing obligations for natural or legal persons vis a vis the state must also be in statute form (RF 8:2 p.2), as must the rules concerning the basic structure and competence of local authorities (RF 8:5). However, in both these areas, RF 8:7 provides that the parliament may, by statute, delegate power to the government to issue ordinances (*förordningar*). Moreover, parliament may authorize the government to sub-delegate this power to administrative agencies or local authorities (RF 8:10). Under RF 8:7 and 8:11, the government also has an independent power to issue ordinances in areas not specifically reserved for statutes and may sub-delegate this power to administrative agencies. Usually, one tries to avoid passing laws quickly, in order to leave time for consultation with a variety of public bodies and civil society. Draft laws are also submitted to the Council on Legislation that consists of judges temporarily seconded from the Supreme Court and the Supreme Administrative Court. The Council checks the constitutionality of the proposal and performs a quality control function on it.

Acts of parliament are generally necessary to limit constitutional rights. The rights most directly relevant during the Corona-crisis are the freedoms of assembly (RF 2:1, p. 3) demonstration (RF 2:1 p. 4), movement (RF 2:8), the protection against arbitrary detention (RF 2:6) and the right to protection of private property (RF 2:15). These are all relative rights which can be limited by statute. Restrictions must be necessary and proportional. For some rights, limitations may only be made for specific purposes, for example to combat an epidemic (RF 2:24).

Anticipatory Statutorification in Practice

Two of the main areas where there are existing delegations are public order and as regards measures to prevent the spread of infections. Under the Public Order Act ([*Svensk författningssamling, SFS, 1993:1617*](#)), 2:15, the government may prescribe that organized public gatherings and public events may not be held within a specific area, if the prohibition is necessary inter alia to prevent epidemics. This includes authority to prescribe limits on participants. Under the Act on Protection Against Contagious Diseases (SFS 2004:168), the chief “prevention of contagion” doctor (*smittskyddsläkare*) in each health region has powers to order inter alia isolation of infected people. The Act further provides that the government, or the administrative agency specified by the government, may issue the additional regulations required for an effective protection against contagion and for the protection of individuals (9:4). The government has subdelegated this authority by ordinance (SFS 2004:255) to the central administrative agency, the Public Health Authority (*Folkhälsomyndigheten*). In a “peacetime crisis that has a significant impact on the possibilities of maintaining effective infection protection” the government may issue “other measures” if “there is a need for coordinated national measures or from a national perspective of other specific measures in the field of infection protection” (9:6).

Following the advice of the Public Health Authority, the government took a number of decisions. First, under the Public Order Act, to restrict public gatherings to 500 people, and then later (29 March 2020) to 50 people (SFS 2020:114). Second, universities and high schools (ages 16-19) were ordered to go over to remote teaching (SFS 2020:115). However, nurseries and primary/lower secondary schools (ages 6-15) were kept open, on the basis that the risks the virus posed to children were relatively small, and counter-balanced by the major disruption that this would entail for society, particularly for essential workers with small children. As schools fall within the area of competence of local authorities, authorization to the government to close high schools required the parliament to enact, quickly, a temporary Act (SFS 2020:148). This Act granted the government this power, which was framed more generally to include, if necessary, in the future, also closing nurseries, basic schools and other learning facilities, as well as for ordering provision for day care/schooling of the children of essential workers. The Public Health Authority issued recommendations to the public to maintain “social distancing”, in all public places and on public transport. No shops, gyms or other businesses were ordered to be closed, but restaurants, bars etc. were only to allow table service and to take steps to reduce over-crowding.

The government has taken a large number of economic measures designed to provide relief for businesses and as regards unemployment benefit (relaxing requirements for medical certificates etc.). Chapter 9 RF sets out parliament’s powers very summarily, so the government rarely needs to seek parliamentary approval for such measures. The central bank has introduced measures to expand credit to banks. Under RF 9:13, the central bank has an autonomous position. However, a recent Commission of Inquiry has proposed regulating the powers of the central bank in much more detail, thus reducing its freedom of manoeuvre. This has drawn criticism from the central bank which argued that the powerful measures it introduced during the Corona-crisis would not be possible if these proposals became law.

The government position not to take more drastic legal measures was partly due to doubts as to whether such measures could fall under existing delegations of power, but more because the government and the Public Health Agency considered that most people could be relied upon to follow recommendations. This is not unjustified: Sweden enjoys high levels of social trust.

The New Delegated Power

On 4th April, the government submitted a draft law to the Council of Legislation, amending the Act on Protection Against Contagious Diseases and providing for broader delegated powers to the government to impose restrictions on businesses, and to impose requirements on local and regional authorities to (re)distribute equipment and resources. The reasons given were it was unclear whether the existing delegations in the Act and the Public Order Act would be sufficient legal basis for the sort of measures that may prove necessary in the future. Perhaps it was felt, although this was not stated, that measures directed against private businesses

which can potentially cause large economic losses, and measures restricting local government autonomy, need both a democratic mandate and a clear legal basis. The proposal was simultaneously sent for consultation for a very short – 24 hour – period, beginning on a Saturday evening (!) to a limited number of public bodies. The draft delegation was widely formulated. The *travaux préparatoires* make clear that the powers could not be used to introduce detention or restrictions in freedom of movement.

The Council on Legislation was critical of the short consultation period, combined with the small number of bodies consulted. It proposed that the delegation be framed in more specific terms, with clear examples in the text of the law rather than in the *travaux préparatoires*. It also proposed that the timing of the duty to place ordinances before the parliament be clarified. During the crisis, the parliament continues to sit, although it decided to reduce its membership (in proportion to representation) from 349 to 55. The parliament's Committee on the Constitution (*Konstitutionsutskottet*, KU), to which bills raising constitutional issues are referred, made another concrete proposal for a change, namely that the power to issue government ordinances only be exercised where there was a clear need for speed in each particular case. KU also emphasized the importance of the Government making a proportionality assessment when issuing ordinances. Moreover, it stressed that as it is not always entirely clear what should be seen as a "restriction" in a constitutional right, the government should be particularly careful in issuing ordinances which can have the effect of restricting such a right. The government accepted all the concrete criticisms made and reformulated the provisions accordingly.

The law (SFS 2020:241) is temporary, expiring June 30th, 2020. The first new provision (6a§) in the Act provides that the government may issue "1. temporary restrictions on public gatherings; 2. temporary closure of shopping centers and other shopping venues; 3. temporary closure of social and cultural meeting places; closure or other restrictions on transport or use of infrastructure, such as ports, airports or bus or railway stations; 5. temporary enabling of the mutual trade or redistribution of drugs or protective materials and other medical equipment for private healthcare providers and other private operators; or 6. temporary measures of a similar nature." Under the new 6b§ "the government may issue special regulations on cooperation and mutual trade or redistribution of drugs and medical equipment in regions and local authorities, if it is necessary to maintain effective infection control to deal with the spread of the virus that causes covid-19". The new 6c§ provides that regulations involving restrictions in civil rights (Article 6 ECHR) can be appealed against to the administrative courts. Finally, a requirement is made to submit regulations that have been issued on the basis of § 6a or 6b *immediately* for the Riksdag's approval.

Concluding Remarks

In conclusion, there will likely be a renewed discussion of whether a constitutional state, or states, of emergency should be introduced in the future. As regards present measures, it is far too early to say how successful Sweden's policies are, and will be, compared to the stricter legal measures taken by most other countries. Measures are necessary in the early phases of a pandemic to stop hospital care being

overwhelmed, but it seems clear that there has been a high level of compliance with the “soft” recommendatory measures. However, the grim instrument for measuring “success” that the media have focused on, the death rate, shows that Sweden has so far experienced higher death rates, per capita, than its Nordic neighbours, all of which have taken more [far-reaching legal measures](#). On the other hand, the main problem in Sweden appears to have been that the virus early on got into old people’s homes run by local authorities and private companies. The Swedish debate in the future is likely to be about how this happened, and what could and should have been done to prevent this.

